

The Director General



EUROPEAN COMMITTEE FOR STANDARDIZATION
COMITÉ EUROPÉEN DE NORMALISATION
EUROPÄISCHES KOMITEE FÜR NORMUNG

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Brussels, 16 July 2015

Ref.: 14904

Subject: Public communication from the European Commission on Austrian Federal Act on Standardization 2015 (notification number 2015/320/A)

Dear Madam/Sir

I refer to the above-mentioned notification to the European Commission by the Austrian authorities regarding the draft federal Act on Standardization 2015, which is publicly available on the Commission's website¹.

I, in my capacity as Director General of CEN, the European Committee for Standardization, must express our concerns regarding some specific aspects covered in the draft Austrian Act on Standardization. In particular, I refer to some provisions that appear to be a step backwards in terms of the implementation of an efficient European standardization system, or that may risk to create difficulties for the Austrian national standardization body to fulfil the criteria for membership in CEN, and even jeopardize the ASI membership in CEN in the future.

CEN's main concerns, which are further detailed in the annex to this letter, regard the following points:

1. The risk of non-fulfilment of the CEN membership criteria of stability and viability by the Austrian national standardization body.
2. The risk of non-fulfilment of the CEN membership criteria of neutrality of interests, impartiality and independency of the Austrian national standardization body;

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¹ See: <http://ec.europa.eu/growth/tools-databases/tris/en/>

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3. The risk of infringement of CEN copyright on European standards, as well as the CEN policy of standards distribution;
4. The "mandatory" use of nationally adopted European standards and the potential lack of coherence of such provision with the European Regulation (EU) 1025/2012 on standardization;
5. The declaration of "inconsistency" of a standard by an Austrian authority and the coherence with European Regulation (EU) 1025/2012;
6. The missing reference to the obligations under European Regulation (EU) 1025/2012 regarding the notifications of national standardization initiatives at European level;

Considering the importance of this matter, we would like to invite you to contact us should you have any question or need further clarification on our above comments. For all queries you can contact Mr Bardo Schettini, Director Legal Affairs, at +32.2.5196883 or bschettini@cencenelec.eu

Finally, considering that our comments also relate to the implementation of the European Regulation (EU) 1025/2012 on standardization, we have informed the European Commission about the position of CEN on the draft federal Act on Standardization.

Yours sincerely,



Elena SANTIAGO CID

cc: Mr F. SMAXWILL, CEN President
CEN National members
Mr Christian GABRIEL, ÖVE Managing Director

Annex: CEN comments following the public communication from the European Commission on Austrian Federal Act on Standardisation 2015 (notification number 2015/320/A)



Annex

CEN comments following the public communication from the European Commission on Austrian Federal Act on Standardisation 2015

(notification number 2015/320/A)

1. The risk of non-fulfilment of the CEN membership criteria of stability and viability by the Austrian national standardization body

The CEN membership criteria are laid down in the CEN Statutes and in the CEN-CENELEC Guide 20 on "Guide on membership criteria of CEN and CENELEC"². Guide 20 is based on –and goes beyond– the WTO principles of standardization and is a binding document that all CEN members have to comply with at all time.

Within this context we note that Art. 3 of the draft Act foresees that the Austrian Ministry can grant to an organization the "authority" to make standards for a period of five years and that such "authority" can be extended for a further 5 year period. Furthermore, the Ministry can withdraw the "authority" with a notification of one year.

Considering the increasing complexity of the European standardization process, it is of paramount importance to guarantee that each CEN national member is able to fulfil all obligations ensuing from its membership in CEN, as well as from the application of EU Regulation 1025/2012. However, this requests long-term commitment and investment from both CEN and each national member.

With this in mind, we are concerned that the possibility that the mandate given to an organization to act as the Austrian national standardization body can change after a term of 5 years does not provide a reasonable assurance of adequate stability to perform and fulfil efficiently all the obligations linked to European standardization.

Consequently, we have reasonable doubts that the Austrian national standardization body may not be able to fully satisfy the criterion of stability and viability as laid down in §6 of CEN-CENELEC Guide 20.

Furthermore, Art. 3 (1) states that the Federal Minister will "instruct" the selected organization to join the European Committee for Standardization (CEN). Please, be aware that membership in CEN does not automatically follow the recognition of the status of national standardization body by the national public authorities, nor the formal notification to the European Commission of such status.

CEN is a private European organization and, in accordance with the established rules and practices, in all cases of change of legal status by a CEN national member, the new legal entity will have to go through an independent assessment against the membership criteria of

² Available at: ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/20_CENCLCGuide20.pdf

CEN-CENELEC Guide 20. The new legal entity will be admitted as a national member in CEN (following a positive vote by the CEN General Assembly) only after the assurance that all criteria for membership are duly fulfilled.

2. The risk of non-fulfilment of the CEN membership criteria of neutrality of interests, impartiality and independency of the Austrian national standardization body

We note that Art. 14 of the draft Act foresees a Steering Committee, composed only of representatives of public authorities, to advise and recommend the Ministry on the Austrian standardization strategy. Furthermore, according to Art. 4, the statutes of the Austrian national standardization body shall foresee that representatives of the Federal Government and the regional States seat in the "managing body" of the association with full voting rights. In addition, the draft Act requires the unanimity of votes in the "managing body" for some key management decisions (see Art. 4.3).

Such an exclusive position of the Public authorities in defining the Austrian standardization strategy and market needs raises concerns regarding the ability of the Austrian national standardization body to fulfil the criterion of "Impartiality and independency of structure" established in CEN-CENELEC Guide 20.

In particular, we draw attention to the following text of Guide 20: "*Impartiality also includes the ability to keep an independent position by ensuring the appropriate balance between private and public, economical and societal and environmental interests induced by the standardization work*" (§3.1) and "*The Member ensures its neutrality with regard to the interests of those who develop the content of standards. This implies that the Member's structure is as much as possible independent from external factors and/or stakeholders that can have an influence on the impartiality of the Member*" (§3.3).

The principle of "independency", as applied in CEN in the context of European standardization, also finds its roots in EU Regulation 1025/2012, which recognizes that the independence of CEN, CENELEC and their national Members from "special interests" is one of those WTO standardization criteria to which they have to abide (e.g.: see EU Regulation 1025/2012, Whereas (2))

3. The risk of infringement of CEN copyright on European standards, as well as the CEN policy of standards distribution

CEN has a long established policy on copyright and exploitation rights by its national members. This policy has been adopted in order to safeguard CEN vital interests in ensuring the sustainability of the European business model of standardization. The main lines of CEN copyright and standards distribution policy are set in the CEN-CENELEC Guide 10 "Policy on dissemination, sales and copyright of CEN-CENELEC Publications"³.

If the provisions of Art. 4.7 Art 8 and Art. 9 of the draft Act are confirmed, the Austrian national standardization body would be forced to infringe Article 5.1 of CEN-CENELEC Guide 10 regarding the fundamental principle against the "availability free of charge" of European standards. We should remind that Guide 10 is a binding document for all CEN Members and advise that the infringement of such fundamental provision for CEN may ultimately have consequences for ASI future membership in CEN.

³ Available at: ftp://ftp.cencenelec.eu/EN/EuropeanStandardization/Guides/10_CENCLCGuide10.pdf

Furthermore, the German language is one of the three official languages of CEN. Therefore, contrary to what we understand from reading Art. 8 (1) of the draft Act, ASI is not the holder of any copyright on European standards in German, even after their national adoption in Austria.

4. The "mandatory" use of nationally adopted European standards raises questions on the coherence with European Regulation (EU)1025/2012

While the draft Act recognizes the general principle of voluntary use of standards (Art. 5), it also includes a specific provision under Art. 9, contradicting such general principle: it seems to invite the Austrian relevant authorities to declare standards as "mandatory" in Acts or Regulations. In this case, the "mandatory standard" shall be published in its entirety.

Considering that European standards, once adopted nationally, become national standards within the meaning of the Regulation (EU)1025/2012, CEN is concerned about the inconsistency between Art. 9 of the draft Act with the definition of "national" standard as included in Art. 2 of the EU Regulation (EU)1025/2012.

Indeed, Art. 2 of EU Regulation (EU)1025/2012 clearly recognizes the well-established practice in Europe of voluntary use of standards by saying that "*standard* means a technical specification, (...), with which compliance is not compulsory, (...)".

Furthermore, considering that standards are technical specifications reflecting the "state of the art" at the moment of their adoption, we draw attention to the difficulty that the Austrian national standardization body may encounter when facing the obligation to adopt a new/revised European standard on the same subject than a previous one declared mandatory, and to withdraw the latter from the catalogue.

5. The declaration of "inconsistency" of a standard by an Austrian authority may raise questions on the coherence with European Regulation (EU)1025/2012

We note that Art. 5 of the draft Act foresees the possibility for the relevant national authority to determine anytime (with binding decision) that a voluntary standard is "inconsistent" with an Austrian Act or Regulation and requests either its revision or withdrawal. The draft Act does not specify if such determination by the public authorities also refers to European "harmonised" standards.

As a reminder, following a specific European Commission's request, CEN elaborates and approves European "harmonised" voluntary standards, whose characteristic is to provide presumption of conformity to the relevant European legislation (EU Directives or Regulations), and whose reference is published in the European Official Journal.

Within this context, in case the Austrian authorities request the withdrawal or revision of a "harmonised" standard that they may find *inconsistent* with an Austrian Act or Regulation, we may risk to face a problematic situation. Indeed, on the one side, ASI risks not to comply with the CEN obligation regarding the identical adoption of European standards by all national members. On the other side, the Austrian authorities may face legal challenges regarding the infringement of the principle of free movement of goods within the Single Market by having requested the withdrawal or revision of "harmonised" standards ensuring presumption of conformity of a product/process at European level.

Please be aware that it is the view of the European Commission that national authorities cannot take decisions restricting the free movement of products complying with such a "harmonised" standard⁴. This position has also been confirmed by the European Court of Justice⁵.

On this matter you may also refer to Art. 3 (6) of Regulation 1025/2012 which, in line with the above, prescribes that after the approval of a harmonised standard the "*national standardisation bodies shall not take any action which could prejudice the harmonisation intended and, in particular, shall not publish in the field in question a new or revised national standard which is not completely in line with an existing harmonised standard*".

6. The obligations regarding notification at European level of national standardization initiatives are missed (information procedure)

We note that Art. 6 (4) of the draft Act foresees clear obligations for the Austrian standards organization to consult at national level prior to developing or revising a national standard. However, it does not refer to the relevant provisions under Art.4 of Regulation 1025/2012 regarding the parallel obligations for the Austrian standards organization vis-à-vis other European and national standardization bodies.

⁴ See (OJ No C 59, 1982-03-09)

⁵ See also Court of Justice in Case 815/79 Cremonini/Vrankovich (European Court Reports 1980, p. 3583)